SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 550

CIA. MAR. ADRA S.A.,
Petitioner,

—against—

SAMUEL MOSLEY,
Respondent,

—against—

LIPSETT STEEL PRODUCTS, INC.,
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF CIA. MAR. ADRA S.A.

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and
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On Petition

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LIPSETT STEEL PRODUCTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Cia. Mar. Adra S.A. prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered June 11, 1966 insofar as it affirmed the judgment which was entered in the United States District Court for the Southern District of New York in favor of the respondent-longshoreman, Samuel Mosley against petitioner in the amount of $125,000.00 as damages for personal injuries.

This petition, however, is prayed for only in the event this Court should grant the petition for a writ of certiorari filed by respondent, Lipsett Steel Products, Inc. in No. 498 at this term. If the petition

in No. 498 is denied, Cia. Mar. Adra does not ask that the present petition be granted.

Citations to the Opinions Below

The memorandum opinion of the District Court is unreported and is printed in Appendix A, hereto infra, p. 13. The majority opinion and dissenting opinion of the United States Court of Appeals, printed in Appendix B hereto, infra, p. 17 is reported at 362 F.2d 118.

Judgments entered after a prior trial of this same matter were reversed because of substantially the same errors as are here claimed on the charge to the jury on the respondent-longshoreman's case against the petitioner and the case in its entirety was remanded for a new trial by the Court of Appeals. That opinion of the Court of Appeals appears at 314 F.2d 223. This Court denied certiorari at 375 U.S. 829.

Jurisdiction

The judgment of the Court of Appeals was entered on June 16, 1966, printed in Appendix C hereto, infra, p. 28. The petition for rehearing by respondent, Lipsett Steel Products, Inc. from the award of indemnity was denied on July 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 19(b) of this Court.

Questions Presented

1. Whether in a case which is predicated solely on breach of warranty of seaworthiness, the claim based on negligence having been dismissed for failure to establish negligence, is it nevertheless proper to charge the negligence concept of "safe place to work" and equate it with "fitness for intended use"?

2. Whether a charge is correct which instructs a jury that it may find unseaworthiness by taking into account all the circumstances, all the conditions then obtaining, without regard to whether it has been established that at least some of the conditions rendered the vessel unfit for its intended use or purpose?

Statement

This case arises out of an accident which was sustained by a longshoreman in the course of a loading operation being conducted by his employer, respondent, Lipsett Steel Products, Inc. aboard petitioner's vessel. The cargo being loaded at the time was loose scrap metal of varying sizes and shapes. It was dumped into a semi-circular steel chute which was suspended on an incline from the main deck into the hatch opening. The scrap was caused by gravity to slide down and off the bottom end of the chute into the hatch storage areas.

The accident in question occurred some two hours after loading had commenced. Up to about the time of the accident the work had proceeded without in-

cident. The plaintiff-longshoreman, whose duty it was to see to it that the scrap was loaded properly; to remove any scrap which might become lodged in the chute and to assist in changing the chute when a particular area became filled, stayed in the tween deck of the hatch where his gang was loading the loose scrap metal. Except for the time shortly before the accident when the chute was moved because the area into which the chute had pointed became filled, plaintiff stood on the deck out of the way of the falling scrap metal.

Shortly before the accident, plaintiff noticed that a piece of scrap metal, which he was not otherwise able to identify from the position where he was standing, became lodged in the chute several feet from its lower end. Before proceeding to investigate, plaintiff made certain that the loading had stopped and he then picked up a piece of scrap metal which some other longshoreman had improvised into a hook and proceeded toward the chute where the scrap was lodged. In order to reach the chute, it was necessary for the plaintiff to step on scrap metal which had fallen onto the deck in the vicinity of the chute. Without hesitation, plaintiff walked over this scrap and on reaching the chute noticed that the scrap which was creating the problem was what appeared to be the rear end of an automobile. Although the plaintiff was mindful of the fact that he was standing on scrap metal of varying sizes and shapes; that his footing was insecure, and that the chute was at such a height that he had to elevate his hands to eye level in order to pull on the improvised hook, plaintiff attached the hook to the rear end of the automobile and exerting all his

strength and weight tried to pull the lodged piece of scrap metal over the side of the chute. The inevitable happened. The rear end of the automobile would not dislodge but instead the scrap underfoot moved and plaintiff fell backwards.

Plaintiff sued petitioner-shipowner claiming that his accident was caused by the unseaworthiness of petitioner's vessel and the negligence of petitioner. Petitioner impleaded plaintiff's employer, respondent, Lipsett Steel Products, Inc., claiming indemnity for breach of warranty of workmanlike service.

Following the first trial, a jury awarded plaintiff recovery against petitioner and awarded petitioner indemnity against Lipsett Steel Products, Inc., the employer.

On appeal to the Court of Appeals, the jury verdict in plaintiff's favor was set aside for errors in the charge and the case remanded for a new trial on all issues. (314 F.2d 223) Certiorari was denied. (375 U.S. 829) On the first trial, the Court had charged the jury that it could find the vessel unseaworthy on several alternate grounds even though there was no proof that some of the grounds constituted unfitness for intended use. Because of the possibility that the jury may have based its finding on an unproven ground and since it was not possible to tell from the general verdict on which ground the jury's finding was based the case was remanded for a new trial.

On retrial, despite the admonition of the Court of Appeals, the Trial Court again not only instructed the jury that it could find unseaworthiness on the

basis of the unproven grounds previously held to constitute reversible error, but added new ones.

The Trial Court charged the jury in part:

> "Specifically here the question which you have to decide is whether under all the circumstances the tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into consideration all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck."

The charge respecting the hook is particularly noteworthy. It said:

> "And I say to you now that there is no evidence in this case from which you could find that there is any defect in the hook. So take that out of your thinking on this except in the sense that the procedures were, * * * that the scrap would stick in the chute from time to time during these operations, and the first thing that was done to try to free the chute was for the plaintiff, or one working down there in the hold, as he was, to go over and yank that scrap out of there with his hook, and if that failed, then they lower the chute, or do something else to clear the chute." (R360-361)

On Appeal, the Court of Appeals, in a two to one decision, affirmed. Under its decision, no longer need there be a complete divorcement of unseaworthiness from concepts of negligence. Nor under the decision

is it necessary to establish that the vessel or its appliances or equipment were not reasonably fit for their intended use or purpose. Seaworthiness can be found even though none of the grounds on which it is predicated are either proven or constitute unfitness for intended use. In affirming the Court said:

> "The defendant shipowner argues that this charge permitted the jury to consider 'grounds which were not established by the evidence.' But the evidence on each point mentioned in the charge need not be weighed separately. Mosley's contention, and the theory on which the case was submitted to the jury, was that the various factors mentioned each contributed to the unseaworthiness of the 'tween deck area, i.e., rendered it unsuitable for the use to which it was put."

A litigant under this decision now has a choice. If he can establish unfitness for intended use he may proceed to prove it. If he does not desire to do so or is unable to establish unfitness all he need do is lump everything together and ask the jury to conclude from the fact of his injury that the place of work was unsafe.

Reasons for Granting the Writ

1. The decision of the Court below in the instant case is in conflict not only with its own prior decision in this case but with the principles laid down in cases such as *Kent* v. *Shell Oil Company,* 5 Cir., 1961, 286 F.2d 746; *Freitas* v. *Pacific Atlantic Steamship Company,* 9 Cir., 1955, 218 F.2d 562.

In *Kent* v. *Shell Oil Company,* 286 F.2d 746 the Court said at page 752:

> "* * *. Unseaworthiness to be sure sets in train awesome obligations which distinguish it from negligence. Michalic v. Cleveland Tankers, 1960, 364 U.S. 325, 81 S. ct 5, 5 LEd 2d 20, Cox v. Esso Shipping Co., 5 Cir., 1957, 247 F2d 629, 1957 AMC 1927. But neither under negligence principles nor the unseaworthiness doctrine does mere injury give rise to a claim. There must be evidence that within the classic definition of seaworthiness the gear being used is not reasonably fit for its intended use. * * *"

As the Court correctly pointed out in *Cox* v. *Esso Shipping Company,* 247 F.2d 629, 637, the standard by which negligence is to be measured and that by which seaworthiness is to be tested are clearly different and must be clearly distinguished otherwise the jury will get the impression that both concepts are to be tested by one gauge.

In its first decision (314 F.2d 223) in this case the Court of Appeals said at pages 228-229:

> "It is true that a shipowner can be held liable for failure to meet this duty to provide a seaworthy ship because an appurtenant appliance brought on board by the stevedore is not reasonably fit for its intended use * * *. But the existence of this principle of law does not relieve the plaintiff of his burden of demonstrating by a preponderance of the credible evidence that the appliance or tool which he claims caused his injury * * * was not reasonably fit for its intended use. * * *."

> "* * *. But as we have many times said, the mere fact that an acccident occurs and a seaman is injured while using an appurtenance in the performance of his duties cannot, without more, establish that a vessel is unseaworthy. * * *."

The Court in its prevailing opinion did not disagree that each of the grounds was not established. It dismissed the contention by stating:

> "* * *. But the evidence on each point mentioned need not be weighed separately. Mosley's contention, and the theoory on which the case was submitted to the jury, was that the various factors mentioned each contributed to the unseaworthiness of the 'tween deck area, i.e., rendered it unsuitable for the use to which it was put."

However, as Judge Friendly points out in his dissenting opinion, the problem was not that simple. He stated:

> "* * *. Whether the form of the chute afforded any basis for a finding of unseaworthiness is decidedly questionable; we have been pointed to no evidence that its configuration departed from the norm, and the tapering must have served a useful purpose in decelerating the falling scrap. However, the jury was permitted to find unseaworthiness not only on these accounts but on the basis of 'the type of operation that was going on' and 'the condition of the deck'—activities and results being currently created by Mosley's employer, Lipsett, in the work it was hired to perform. Metal scrap can hardly be loaded so as to leave a 'tween deck entirely spick and span; if

> Lipsett exceeded permissible limits of messiness, this went to its negligence but not to the seaworthiness of the ship. Cf. Morales v. City of Galveston, 370 U.S. 165 (1962). In granting the ship's motion for judgment n.o.v. against Lipsett, the judge recognized that the absence of lighting might be 'the only unseaworthiness,' yet his instruction permitted the jury to find against the ship not only on that permissible ground but on impermissible ones. The same rule of law applied in our prior decision requires a new trial."

The "Turmoil" was a cargo vessel in the process of being loaded with scrap metal. She did not cease to be "reasonably fit for her intended service" *Mitchell* v. *Trawler Racer, Inc.,* (1960), 362 U.S. 539, 550 simply because the scrap metal was on the deck where it was supposed to be loaded. The facts here bear no resemblance to the conditions of disarray in *DeGioia* v. *United States Lines Company,* 304 F.2d 421, 423, 2 Cir., 1961.

2. Clearly, the questions presented are of importance because of the large bulk of litigation in the Courts throughout the nation which involve not only longshoremen and seamen, but shoreworkers aboard ships as well.

Settlement of the question of what constitutes unseaworthiness and what is the burden which must be met in order to satisfy the requirements of this concept of liability would be in the public interest. While it seems that this Court was quite explicit in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 in holding that while there should be a complete divorcement of un-

seaworthiness liability from concepts of negligence and that this did not obligate the owner to provide an accident proof ship, the Courts appear to be construing *Mitchell* as a license to broaden and increase the shipowner's liability.

3. The decision of the Court below is believed to be erroneous as it is not only in conflict with cases such as *Kent* v. *Shell Oil Company,* 5 Cir., 1961, 286 F.2d 746 but with applicable decisions of this Court. In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550 this Court said:

> "What has been said is not to suggest that the owner is obligated to furnish an accident free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin v. Lykes Bros. S.S. Co. 348 U.S. 336, 99 L. ed. 354, 75 S. Ct. 382."

The reference to the *Boudoin* case would not seem to be without purpose. While that case involved liability arising from the assault of one crewmember upon another, it emphasized that not every crewmember renders the vessel unseaworthy merely because he becomes involved in a fight.

Such cases as *M.V. Tungus* v. *Skovgaard*, 1959, 358 U.S. 588, 594, *West* v. *United States*, 1959, 361 U.S. 118, 122-123, *Morales* v. *City of Galveston,* 370 U.S.

165, 170, 171 indicate that "safe place to work" is a negligence concept and has no place in the doctrine of seaworthiness.

Never has this Court, and, as far as research has been able to disclose, has any other court held that the issue of seaworthiness was to be determined by a jury's own concept of whether under "all the circumstances * * * all the conditions" the working area "was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety". Under such an instruction it would hardly be possible to deny recovery even if the vessel was seaworthy.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted if the writ in #498 should be granted.

Respectfully submitted,

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VICTOR S. CICHANOWICZ
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On Petition

Appendix A

MEMORANDUM

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. No. 127-204

SAMUEL MOSLEY,

Plaintiff,

against

CIA. MAR. ADRA S.A.,

Defendant and
Third-Party Plaintiff,

against

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant.

MACMAHON, *District Judge.*

Plaintiff, a longshoreman employed by third-party defendant, was injured while loading scrap metal in a tween deck area of defendant's vessel. The jury, on a theory of unseaworthiness, returned a verdict in favor of plaintiff, but refused to award indemnity to the ship in its action over against the stevedore. Defendant now moves under Rule 50(b) of the Federal Rules of Civil Procedure for judgments n.o.v. against both plaintiff and third-party defendant, or, alternatively, for new trials. With regard to the main action, it contends that the vessel was seaworthy as a matter of law and that the award of $125,000.00 was unreasonably

excessive; and with regard to the suit for indemnity, that the stevedore was liable over to it as a matter of law.

Taking these contentions one at a time, we have no doubt that the issue of seaworthiness was properly submitted to the jury and that the jury could reasonably have found that the tween deck area was not a reasonably safe place for plaintiff to perform his assigned task of removing obstructions from the chute in order to continue stowing the scrap cargo as directed. The jury could find from uncontradicted evidence that, on the occasion in question, plaintiff approached the chute over a deck littered with scrap, tried to secure an adequate footing but due to darkness could not see whether the scrap on which he was standing was firm or loose, reached upward and forward with an improvised hook, started to pull on a piece of scrap lodged in the narrow end of a tapered chute, and fell backwards when his footing gave way. We think the jury could reasonably have found that the lighting was so poor as to constitute an unseaworthy condition and the proximate cause of plaintiff's injuries. There was ample evidence that the daylight was all but blocked out of the hold by intense dust, the large intruding chute, the overhead magnet, and the high pile of scrap pyramided almost to the bottom of the coaming which framed the square of the hatch. Artificial lighting was available but not provided. The jury could also have reasonably found that the chute was tapered too narrow at the bottom for the size of some of the pieces of scrap and therefore unfit for its intended purpose; that the deck was so cluttered that it was a hazardous floor for the task assigned to plain-

tiff; that the primary method of clearing the chute was itself unsafe; or that any of these factors—the darkness, the chute, the size of the lodged piece of scrap, the littered deck, the method of clearing the chute—operated in combination, *Kray* v. *United States,* 123 F. 2d 1008, 1010 (2d Cir. 1941), to create an unseaworthy condition.

Nor is the verdict excessive as a matter of law. There was evidence adduced that at the time of his injury plaintiff was earning between six and seven thousand dollars a year; that he could reasonably have expected to continue working as a longshoreman for nineteen years, with wage rates on the rise; and that as a result of his injury he is permanently disabled from performing the kind of heavy labor by which he has always earned his living. There was further evidence that his education is slight. This, combined with the fact that plaintiff is a Negro, substantially reduces his opportunity to mitigate damages in the fields left open to him. In addition, there was voluminous evidence of pain and suffering, past, present, and future. Plaintiff appeared to have unfeigned difficulty walking to and from the stand, a fact which the jury could surely consider. In short, while the award is high, it cannot be said to be unreasonably excessive.

Defendent's third contention is that it is entitled to indemnity as a matter of law. With this contention, we wholly agree. The law is clear that a stevedore is liable over if he himself created the unseaworthy condition, or if the performance of a workmanlike job called for the elimination of a known risk created by another. *Mortensen* v. *A/B Glittre,* 348 F.2d 383, 385 (2d Cir. 1965); *Albanese* v. *M. V. Nedorl, Amerik*

Stoomv, Maata., 346 F. 2d 481, 484 (2d Cir.), *rev'd on other grounds*, 34 U.S.L. Week 3217 (Dec. 13, 1965). Here, there is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore and that the verdict in its favor is against the weight of the evidence. Even if we assume that the absence of lighting was the only unseaworthiness and that this condition was in its inception wholly attributable to the owner's failure to provide internal lights, the stevedore could and should have corrected it. There was uncontradicted evidence that electrical outlets were installed in the hold where plaintiff was working and that, in another hold on an earlier day, the stevedore had made use of such an outlet to provide artificial illumination. In this regard, plaintiff's knowledge of inadequate lighting is imputable to his employer, third-party defendant. *Mortensen* v. *A/B Glittre, supra* at 385.

Accordingly, defendant's motion for judgment n.o.v. against plaintiff is denied, and the Clerk is directed to enter judgment for plaintiff in accordance with the jury's verdict. Defendant's motion for judgment n.o.v. against third-party defendant is, however, granted, and the Clerk is directed to enter judgment for defendant against third-party defendant. The jury's verdict for third-party defendant is hereby set aside. Defendant's alternative motions for new trials are in all respects denied.

So ordered.

Dated: New York, N.Y.
January 27, 1966

LLOYD F. MACMAHON
United States District Judge

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 386—September Term, 1965.

(Argued May 25, 1966 Decided June 16, 1966.)

Docket No. 30372

SAMUEL MOSLEY,

Plaintiff-Appellee,

—v.—

CIA MAR. ADRA S.A.,

Defendant-Appellant and
Third-Party Plaintiff-Appellee,

—v.—

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

Before:

FRIENDLY, HAYS and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* based upon the verdict of a jury awarding damages to plaintiff for injury resulting from a breach of the shipowner's warranty of seaworthiness, and from a judgment notwithstanding the verdict in favor of the shipowner against the

third-party defendant, plaintiff's employer, on the issue of indemnity.

Affirmed.

GEORGE J. ENGELMAN, New York, N.Y. (Gay & Behrens, New York, N.Y., of counsel), *for Plaintiff, Mosley.*

VICTOR S. CICHANOWICZ, New York, N. Y. (William P. Larsen, and Cichanowicz & Callan, New York, N. Y., of counsel), *for Defendant, Cia. Mar. Adra S.A.*

VINCENT A. CATOGGIO, New York, N. Y. (Purdy, Lamb & Catoggio, New York, N.Y., on the brief), *for Third-Party Defendant, Lipsett Steel Products, Inc.*

HAYS, *Circuit Judge*:

Plaintiff Mosley, a longshoreman in the employ of a stevedore company, Lipsett Steel Products, Inc., the third-party defendant, was injured while loading scrap metal on the *S.S. Turmoil*, a vessel owned and operated by Cia. Mar. Adra S.A., the defendant. This is an appeal by the shipowner from a judgment of $125,000 entered in the United States District Court for the Southern District of New York, in favor of Mosley for injury resulting from a breach of the shipowner's warranty of seaworthiness. The stevedore company appeals from a judgment notwithstanding the verdict in favor of the shipowner, on the issue of indemnity. We affirm on both appeals.

This case is before us for a second time, having been reversed and remanded for a new trial on a previous

appeal because it was impossible to ascertain whether the general verdict for plaintiff was based on a permissible ground, a finding that there was insufficient lighting, or on an impermissible ground, the use of a hook which was not shown to be an appurtenance of the ship or unfit for its intended use. See *Mosley* v. *Cia. Mar. Adra, S.A.*, 314 F. 2d 223 (2d Cir.), cert denied, 375 U. S. 829 (1963).

I.

There is evidence in the record to support the conclusion that the injury to Mosley occurred in the following way.

On October 8, 1956 the *S.S. Turmoil* began loading a cargo of scrap metal at the Port of Newark. Mosley was part of a gang assigned to load scrap into the 'tween deck of the #5 hatch. Mosley's job was to direct the placing of metal scrap which a crane dumped down a chute. When one part of the 'tween deck became filled, he would direct the chute toward another area in order to assure an even distribution of the cargo. The chute, forty feet long and three to five feet wide at top, tapering to the bottom, was suspended in the hatch from the cargo runners of the ship by means of bridles and shackles.

At the close of the workday on October 14, the day before the accident, a load of scrap metal had been placed in the square of the hatch of the 'tween deck to a height of three-and-a-half or four feet, partially blocking the entry of natural light.

The next morning, after Mosley had been at work about an hour and a half, "a piece of transmission or

the rear end of a car" became lodged in the tapered end of the chute, about three feet from the mouth and blocked the flow of scrap.

Mosley, who was working alone on the 'tween deck, told the foreman to suspend the loading. He approached to within four or five feet of the chute, intending to use an "improvised hook" five or six feet in length, to dislodge the metal. He positioned himself "as best as I possibly could" on a deck littered with irregular pieces of scrap. While he was attempting to remove the obstruction, the scrap under Mosley's feet gave way; he fell and was injured.

The trial judge charged the jury:

> "Specifically here the question which you have to decide is whether under all the circumstances the tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into consideration all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck.
>
> * * * *
>
> But consider all the conditions and decide whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety."

The defendant shipowner argues that this charge permitted the jury to consider "grounds which were

not established by the evidence." But the evidence on each point mentioned in the charge need not be weighed separately. Mosley's contention, and the theory on which the case was submitted to the jury, was that the various factors mentioned each contributed to the unseaworthiness of the 'tween deck area, i.e., rendered it unsuitable for the use to which it was put.

In *Krey* v. *United States,* 123 F. 2d 1008, 1010 (2d Cir. 1941) this court, referring to a number of separate factors which, it was charged, resulted in the unseaworthiness of an area of the ship, held that:

> "*these factors combined* seem to us clearly to establish an unseaworthy condition." (Emphasis added.)

Here, the chute was specifically put in place to receive the cargo of metal scrap. It was an appurtenance of the ship. Plaintiff presented evidence that because of the tapered nature of the chute, and the diverse sizes and shapes of the metal scrap, obstructions were bound to occur. "The vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute." *Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 327 (1960).

The 'tween deck was littered with irregular pieces of metal scrap. The chief officer of the *S.S. Turmoil* testified that he refused to enter the 'tween deck area during loading because it was "dangerous"; scrap would "fall off" the chute; it "bounces" and "ricochets around." This situation when combined with lack of adequate lighting resulted in unseaworthiness.

See *Ross* v. *S.S. Zeeland,* 240 F. 2d 820, 822-23 (4th Cir. 1957). There was more than enough evidence to support a finding that there was insufficient lighting in the 'tween deck area. See *Mosley* v. *Cia. Mar. Adra, S.A.,* 314 F. 2d 223, 227-28 (2d Cir.), cert. denied, 375 U. S. 829 (1963).

Defendant contends that portable lighting equipment was available to the longshoremen on request. There is testimony that such equipment was in the storehouse of the ship, but there is no showing that it was available for this area on the date in question. Nor was evidence produced concerning the adequacy and condition of electrical outlets. Indeed, Foreman Brown, who was in charge of loading, testified that his general request for lighting equipment was not acted upon.

In *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 103-04 (1944) the Supreme Court said:

> "Nor does the fact that there was sound rope on board, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one . . . the owner must provide the seaman with seaworthy appliances with which to do his work, . . . *safe appliances* [*must*] *be furnished when and where the work is to be done.*" (Emphasis added.)

Unseaworthiness is not "excused because proper equipment was available but went unused." *Skibinski* v. *Waterman S.S. Corp.,* —— F.2d —— (2d Cir. March 31, 1966).

"[T]he owner warrants to longshoremen . . . a safe place in which to handle cargo." *Carabellese* v. *Na-*

viera Asnar, S.A., 285 F. 2d 355, 359-60 (2d Cir. 1960), cert. denied, 365 U.S. 872 (1951). There was ample evidence to support the jury's finding that the place where Mosley was assigned to work was unsafe.

Defendant also argues that the district court "submitted the case to the jury on issues other than those defined and limited by the pre-trial order." The pre-trial order simply indicated that "all the issues of fact and law to be raised at the second trial of this action have previously been raised at the first."

Mosley's proof involved substantially the same factors on both trials. To the extent that there was any variation, the district court properly modified the pre-trial order pursuant to Rule 14, of the Calendar Rules of the United States District Court for the Southern District of New York.

There is nothing in the charge of the district court concerning the hook used by Mosley that conflicts with this court's opinion in *Mosley* v. *Cia. Mar. Adra, S.A., supra.*

II.

The jury returned a verdict in favor of the stevedore company, in the third party action brought by the shipowner for indemnity. The district court set aside the verdict and granted judgment n.o.v. to the shipowner.

The stevedore company claims that Cia. Mar. Adra did not move for a directed verdict on the third party complaint and therefore could not properly make an n.o.v. motion. See 5 Moore, *Federal Practice* ¶50.08 (2d ed. 1964).

Appendix B

At the conclusion of all the evidence, Lipsett Steel sought dismissal of the third party complaint:

> "on the ground that there is no proof that the third-party defendant failed to perform its contract properly. * * *"

Cia. Mar. Adra's counsel stated:

> "Your Honor, the defendant renews its motion to dismiss the complaint and for a directed verdict on the ground that the evidence *is insufficient on which to go to the jury on any of these issues that have been raised in this case.*" (Emphasis added.)

This motion, although somewhat ambiguous, preserved Cia. Mar. Adra's right to make an n.o.v. motion.

The requirement of Rule 50(b) of the Federal Rules of Civil Procedure,* that a directed verdict motion must precede an n.o.v. motion is harsh in any circumstances. Especially where, as here, three parties are involved, where the attention of the defend-

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* Rule 50(b) of the Federal Rules of Civil Procedure reads in relevant part:

> "(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict."

ant's counsel is focused on the plaintiff, his primary adversary, and where there are the complications which must attend a trial of this type, a motion such as that made by counsel should not be read narrowly, so as to penalize the client but rather should be read in light of the purpose of the Federal Rules to "secure the just, speedy, and inexpensive determination of every action."

Cia. Mar. Adra in a memorandum in support of its n.o.v. motion expressly pointed out to the district court that a motion for a directed verdict had been made. Lipsett Steel in its memorandum of opposition did not dispute this claim. The fact that Lipsett Steel did not take exception to the n.o.v. motion suggests that Cia. Mar. Adra's directed verdict motion was accepted as covering the indemnity issue.

On the merits of the n.o.v. motion, the trial judge ruled that "any seaworthy condition obtaining in the 'tween deck area was created by the stevedore . . ." A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See *Mortensen* v. *A/S Glittre,* 348 F. 2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service. See, e.g., *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U.S. 315, 318-24 (1964); *Crumady* v. *The J. H. Fisser,* 358 U.S. 423, 428-29 (1950); *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124, 133-34 (1956).

Affirmed.

Appendix B

FRIENDLY, *Circuit Judge* (dissenting):

Deeply regretting the necessity, I see no alternative to sending this case back for a third trial in which, hopefully, the jury may be given a proper charge. Despite views last expressed in *Skibinski* v. *Waterman S.S. Corp.*, —— F. 2d ——, —— (1966) (dissenting opinion), slip opinions 1397, 1404, I agree that Mosley was entitled to go to the jury on the issue of inadequate lighting; although the cases generally cited to this point concerned failure to supply lighting at night, *Mollica* v. *Compania Sud-Americana de Vapores*, 202 F. 8d 25, 27 (2 Cir.), cert. denied, 345 U.S. 965 (1953); *Ross* v. *S.S. Zeeland*, 240 F. 2d 820, 822-23 (4 Cir. 1957), the jury could properly have found that the stevedores had created on October 14 a condition of permanent night in the 'tween deck of the #5 hatch. Cf. *Robillard* v. *A. L. Burbank & Co.*, 186 F. Supp. 193 (S. D. N. Y. 1960). Whether the form of the chute afforded any basis for a finding of unseaworthiness is decidedly questionable; we have been pointed to no evidence that its configuration departed from the norm, and the tapering must have served a useful purpose in decelerating the falling scrap. However, the jury was permitted to find unseaworthiness not only on these accounts but on the basis of "the type of operation that was going on" and "the condition of the deck"—activities and results being currently created by Mosley's employer, Lipsett, in the work it was hired to perform. Metal scrap can hardly be loaded so as to leave a 'tween deck entirely spick and span; if Lipsett exceeded permissible limits of messiness, this went to its negligence but not to the

seaworthiness of the ship. Cf. *Morales* v. *City of Galveston,* 370 U. S. 165 (1962). In granting the ship's motion for judgment n.o.v. against Lipsett, the judge recognized that the absence of lighting might be "the only unseaworthiness," yet his instruction permitted the jury to find against the ship not only on that permissible ground but on impermissible ones. The same rule of law applied in our prior decision requires a new trial.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of June one thousand nine hundred and sixty-six.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

SAMUEL MOSLEY,
Plaintiff-Appellee,

v.

CIA. MAR. ADRA S.A.,
Defendant and Third-Party
Plaintiff-Appelant-Appellee,

LIPSETT STEEL PRODUCTS, INC.,
Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the plaintiff-appellee, Samuel Mosley, and to third party plaintiff-appellee Cia. Mar. Adra S.A.

A. DAVID FUSARO
Clerk